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No. 88-1706

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY AND FRVR CORPORATION, PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION

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QUESTIONS PRESENTED

Whether authorization of a consolidation, abandonment, sale or other disposition of rail property by the Interstate Commerce Commission results in displacement of the Railway Labor Act (RLA) by the Interstate Commerce Act (ICA) as the mechanism for resolving labor disputes arising out of the authorized transaction, as the court below held.

If so, whether the Norris-LaGuardia Act (NLGA) prevents issuance of an injunction to enforce compliance with the statutory scheme of the ICA that provides a means for final resolution of disputes substantially identical to that provided for resolution of minor disputes under the RLA, as a majority of the dividend panel below concluded.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1706

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY AND FRVR CORPORATION, PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION

On April 20, 1989, petitioners Chicago & North Western Transportation Company ("C&NW") and FRVR Corporation ("FRVR") filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the decision and judgment of that Court, styled as *Railway Labor Executives' Ass'n v. Interstate Commerce Commission*, 861 F.2d 1082, (8th Cir. 1988), which affirmed in part and modified in part an order of the Interstate Commerce Commission in Finance Docket No. 31205, *FRVR Corporation–Exemption, Acquisition and Operation–Certain Lines of Chicago and North Western*

Transportation Company–Petition for Clarification (served January 29, 1988). The Interstate Commerce Commission ("Commission") respondent in the court below, pursuant to 28 U.S.C. 2341 et seq., respectfully files this brief in support of the petition.

The issues of whether Commission approval of a transaction eliminates the employer's obligation to bargain under Section 6 of the RLA and the effect of a decision on that issue upon the prohibition against injunctions contained in Section 4 of the Norris LaGuardia Act are questions of sufficient importance to the rail industry and the Commission's administration of the Interstate Commerce Act as to have caused both the United States and the Interstate Commerce Commission to urge this Court to grant writs of certiorari in the *P&LE Cases*, Nos. 87-1589 and 87-1888. See especially Brief of United States as Amicus Curiae in Nos. 87-1589 and 87-1888, dated November 1988. This Court granted writs of certiorari in those cases which were argued March 29, 1989.

Although as the United States noted in its previously referred to brief, those questions are fairly presented in the *P&LE Cases*, the Court may not deem resolving them indispensable to a decision in those cases and hence may not reach them. Resolution of those issues is even more urgent now than it was in the Fall of 1988, because the hiatus in the Commission's 10901 line sale program resulting from the initial decision in P&LE I in October of 1987 has continued unabated. Accordingly, the Interstate Commerce Commission urges the Court to grant a writ of certiorari and hold this petition with the other pending petitions[1] for disposition by the Court in the light of its *P&LE Cases* decision.

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[1] The Court has pending three other petitions for certiorari raising similar issues. *City of Galveston v. Railway Labor*

STATEMENT OF THE CASE

1. Under Section 10901 of the Interstate Commerce Act (ICA), a non-carrier can acquire and operate a railroad line "only if the Commission finds that the public convenience and necessity require or permit" that it be done. 49 U.S.C. 10901(a). If the Commission finds that the acquisition is in the public interest, it may approve the acquisition with such conditions, including labor protective conditions, as the Commission "finds necessary in the public interest. . ."[2]. 49 U.S.C. 10901(c)(1)(A)(ii).

Under Section 10505 of the ICA, the Commission has the power to exempt rail transportation from the requirements of the Act. Indeed, the Commission "shall exempt" rail transportation "when the Commission finds that the application of a provision of this subtitle . . . is not necessary to carry out the transportation policy of Section 10101a." 49 U.S.C. 10505(a)(1). The Commission retains its regulatory jurisdiction over the

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Executives' Ass'n, No. 88-517 (petition for writ of certiorari to the Fifth Circuit); *Railway Labor Executives' Ass'n v. Chicago & North Western Transp. Co.*, No. 87-2049 (petition for writ of certiorari to the Eighth Circuit); *Railway Labor Executives' Ass'n v. Guilford Transp. Indus., Inc.*, No. 87-1911 (petition for writ of certiorari to the First Circuit). These cases present the issue of whether the Interstate Commerce Act ("ICA") may supercede provisions of the Railway Labor Act ("RLA") in those cases where the provisions of the latter statute act as obstacles to the consummation of a Commission approved transaction. The Eighth Circuit has previously held that the ICA supercedes the RLA. *Burlington Northern Railroad Co. v. United Transportation Union*, 848 F.2d 856 (8th Cir.) *cert. denied sub nom. Interstate Commerce Commission v. United Transportation Union*, 109 S.Ct. 499 (1988).

[2] See, e.g., *ICC v. Railway Labor Executives' Ass'n*, 315 U.S. 373 (1942); *CMC Real Estate Corp. v. ICC*, 807 F.2d 1025 (D.C. Cir. 1986).

exempt transaction.[3] The Commission may revoke any exemption to the extent the agency finds it "necessary to carry out the transportation policy of Section 10101a." 49 U.S.C. 10505(d). The Commission may not exercise its authority to relieve a carrier of its obligation to protect the interests of employees. 49 U.S.C. 10505(g).

A sea change in the approach to regulation of the nation's rail industry followed the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1941-45. The Staggers Act made possible the sale of marginally profitable rail lines by Class 1 railroads to new entrants in the industry. The new entrants utilize these lines to create short lines and regional carriers to provide new and more creative rail service. Before this trend such marginal lines were simply abandoned and taken out of service, eliminating rail service and the jobs, both on the railroad and in the local community, such service provided. The Commission monitored this trend and determined that the expense of satisfying labor protective conditions suitable for major rail consolidations or line abandonments, if imposed on the sale of a line to a new entrant under Section 10901, would defeat shortline development and force Class 1 carriers to return to the abandonment of these lines.

As the imposition of labor protection in short line sales is within the Commission's discretion, the Commission began withholding labor protective conditions in individual applications.[4] After considering many in-

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[3] See, e.g., *UTU v. Norfolk & Western R. Co.*, 822 F.2d 1114 (D.C. Cir. 1987) *cert. denied*, 108 S.Ct. 700 (1988); *G&T Terminal Packaging v. Consolidated Rail Corp.*, 830 F.2d 1230, 1234-1235 (3d Cir. 1987), *cert. denied*, 108 S.Ct. 1291 (1988).

[4] See, *Knox and Kane Railroad Co.–Gettsburg Railroad–Petition for Exemption*, 366 I.C.C. 439 (1982). The Commission theory

dividual applications, the Commission determined that the formation of new carriers which this policy furthered was beneficial to all concerned. To encourage this trend the Commission promulgated the procedures in Ex Parte 392 (Sub-No.1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd sub nom. Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (mem.) ("*Ex Parte 392*").

Ex Parte 392 established a program by which a carrier could apply for an exemption which would be granted seven days after filing unless the Commission notified the parties to the contrary. Any opposition to the exemption may be presented to the Commission in a petition to revoke the exemption which may be filed at any time. The Commission evaluates the petition and retains authority under its revocation power to correct any problem arising from the transaction. The Commission's list of remedies to correct any such problem range from partial revocation and imposition of labor protections to the termination of the entire exemption.[5] Of

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on withholding protection was grounded on the premises of (1) the preservation of rail service, (2) continued service offers the best opportunity to rail labor for employment, and (3) the process is less cumbersome than abandonment under Section 10903 and sale under Section 10905, the use of which achieves that same result as a Section 10901 sale without labor protection.

[5] The courts have acknowledged that the *Ex Parte 392* line sales program is consistent with the policies expressed by Congress in the Staggers Act amendment to the ICA. *Illinois Commerce Commission v. ICC, supra*; and see, *Pittsburgh & Lake Erie R.R. Co. v. RLEA*, 845 F.2d 420 (3d Cir. 1988). The Staggers Act expanded the Commission's exemption authority. Moreover, Congress directed the Commission to pursue exemptions for transportation operations and to review carrier actions after the fact to correct abuses.

course, the Commission order disposing of the revocation petition is reviewable in the Courts of Appeals. 28 U.S.C. 2342.

As the Commission's data shows, *Ex Parte 392* and the underlying policy has been successful. Railroad formation rose each year since 1982 and the miles of lines abandoned fell each year until the Third Circuit's decisions in *Pittsburgh & Lake Erie R.R. Co. v. RLEA*, 831 F.2d 1231 (*P&LE I*) and *Pittsburgh & Lake Erie R.R. Co. v. RLEA*, 845 F.2d 420 (*P&LE II*) *supra*, were announced in January and April, 1988.[6]

2. The case at bar arose when C&NW, a Class 1 carrier regulated by the Commission, determined to sell one of its lines ("Duck Creek South") to FRVR pursuant to *Ex Parte 392*.[7] C&NW and FRVR filed an exemption request on December 23, 1987. Accompanying the exemption request was a "petition for clarification" asking the Commission to clarify its view as to "the agency's exclusive jurisdiction over labor issues arising out of ICC authorized transactions. . .". The exemption, effective seven days after filing, authorized the sale of the rail line and allowed FRVR to purchase the rail line without the imposition of labor protective conditions.[8]

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[6] On an annualized basis the number of entrants seeking exemptions under *Ex Parte 392* has decreased by approximately 50% from 1987 to 1988. The mileage requested to be transferred under *Ex Parte 392* has decreased by 85%. In contrast the number of miles sought to be abandoned increased for the first year since 1982 from 1,932 in fiscal year 1987 to 2,996 in fiscal year 1988.

[7] FRVR has not previously engaged in the rail business. Therefore it is treated by the Commission as a non-carrier.

[8] On January 19, 1988, C&NW filed a declaratory order action with the United States District Court for the Eastern District of Illinois seeking a judgment that the proposed sale of the Duck Creek South line to FRVR and any labor protective provisions that might

RLEA filed a petition for revocation of the exemption and an opposition to the C&NW petition for clarification. On January 29, 1988, the Commission served a decision responding to the petition for clarification. Finance Docket No. 31205, *FRVR Corp., etc.–Petition for Clarification.* The Commission decision reaffirmed the Commission's position that the ICA grants the Commission exclusive and plenary authority to deal with labor issues that if unresolved would act as obstacles to the consummation of these Commission authorized transactions.

On February 19, 1988, RLEA filed a petition for review of this decision with the Eighth Circuit court of appeals contending that the Commission lacked the authority to issue any decision on the question of the ICA's supersession of any other law and that even granting the Commission's authority to issue its decision the decision was wrong on the merits. A unanimous

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accompany the sale were subject to the exclusive jurisdiction of the Commission and therefore were not a proper subject of bargaining under the Railway Labor Act. During the pendency of this action rail labor informed C&NW of their intent to strike if the sale were consummated. C&NW filed in the district court a motion for a temporary restraining order and preliminary injunction to prevent the strike. RLEA filed cross motions to enjoin the sale and in opposition to the orders sought by C&NW. The court refused to enjoin the sale, holding that it was without jurisdiction to do so because RLEA's effort constituted an impermissible collateral attack on an ICC order. The district court also granted the motion for a preliminary injunction against the strike determining that the dispute between RLEA and C&NW was a "minor dispute" under the RLA dispute resolution procedures and therefore subject to the exclusive jurisdiction of the National Railroad Adjustment Board. This decision was upheld on appeal. *Chicago & North Western Transp. Co. v. RLEA*, 855 F.2d 1277 (7th Cir. 1988) *cert. denied*, 109 S.Ct. 493 (1988).

panel of the Eighth Circuit affirmed the Commission's holding that the RLA must be deemed to be displaced by the ICA to give substance to the "Commission's 'authority to supervise and implement labor protective conditions in terms of sales, acquisitions, and abandonments by railway carriers insofar as this authority is necessary to assure fair wages and working conditions.' " *RLEA v. ICC*, 861 F.2d 1062 (8th Cir. 1988), *reh'g denied* (January 30, 1989) quoting *Burlington Northern R.R. Co. v. United Transportation Union*, 848 F.2d 856, 864 (8th Cir.), *reh'g denied* (September 23, 1988, as amended) *cert. denied sub nom. Interstate Commerce Commission v. United Transportation Union*, 109 S.Ct. 499 (1988). The unanimous panel also held that the Commission's authority "supercedes the authority of the mandatory bargaining provisions of the RLA." *Id.*

However, the majority of a divided panel refused to find a need to accommodate the prohibition against injunctions contained in Section 4 of the NLGA to the ICA, holding that "there is 'no inherent incompatibility' between the recent deregulatory efforts of Congress and the ICC and the continued viability of the Norris-LaGuardia Act." *RLEA v. ICC, supra,* at 1082. Thus, the majority would decline to enjoin rail labor from striking to prevent the consummation of the transaction. *Id.* In a concurring and dissenting opinion Circuit Judge Fagg adhered to his dissent in *Burlington Northern R.R. Co. v. UTU, supra,* that injunctive relief must be available to protect a Commission order from disruption by a strike that challenges the terms of that order and in fact works an "unacceptable neutralization" of the Congressional policy in favor of the Commission's exercise of its authority. *Id.* at 866.

3. As the United States observed in its brief as Amicus Curiae in the *P&LE Cases,* the question of

whether Section 4 deprives a federal court of jurisdiction to enjoin a labor strike designed to block going forward with an ICC-approved rail transaction has immense "practical importance since it typically is the first – and often the most pressing – issue for the courts to decide in labor-management disputes arising out of line sales." Brief pp. 17-18.

Indeed, the answer the courts give to that question will determine whether there will be any line sales, and if so, on what terms. There have been no line sales of any significance upon terms authorized by the Commission since October of 1987 when the Third Circuit Court of Appeals held that federal courts were powerless to enjoin labor strikes designed to block implementation of ICC authorized transactions and vacated the injunction against P&LE's employees striking to block the Commission authorized sale involved in that proceeding. Those decisions are presently before this Court in the *P&LE Cases,* Nos. 87-1589 and 87-1888.

In fact only one line sale of any significance has been accomplished and that happened because management totally acceded to rail labor's terms upon failing to obtain an injunction against a strike designed to prevent the transaction from the United States Court of Appeals for the Eighth Circuit. See, *Burlington Northern R.R. v. United Transportation Union,* 848 F.2d 856, *cert. denied,* 109 S.Ct. 499 (1988). That decision, which was followed by the majority below over the vigorous dissent of Judge Fagg, reiterated by him in dissenting in part from the decision below, is reproduced in the appendix hereto.

The fallacy of the position of the majority is apparent. Although finding that the ICA's dispute resolution procedures, which are substantially identical to the RLA

procedures for resolving "minor disputes," displace RLA procedures in these rail transactions, the majority below held itself precluded from affording the ICA's procedures the protection required to allow them to resolve any labor dispute so as to prevent frustration of the transaction, despite the holdings of this Court in *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R.*, 353 U.S. 30 (1957); *Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970).

CONCLUSION

The petition for a writ of certiorari in No. 88-1706 should be granted and the case held for disposition in light of this Court's decision in the *P&LE Cases,* Nos. 87-1589 and 87-1888.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87-2581

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE

v.

UNITED TRANSPORTATION UNION, APPELLANT

FRED A. HARDIN, J.W. REYNOLDS, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, J. F. SYTSMA AND W. C. WALPERT

RAILWAY LABOR EXECUTIVES' ASSOCIATION

v.

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED TRANSPORTATION UNION, APPELLANT

No. 87-2600

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

v.

UNITED TRANSPORTATION UNION, APPELLEE

FRED A. HARDIN, J.W. REYNOLDS, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, J. F. SYTSMA AND W. C. WALPERT

RAILWAY LABOR EXECUTIVES' ASSOCIATION

v.

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED TRANSPORTATION UNION, APPELLEE

Appeal from the United States District Court for the Western District of Missouri

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Submitted: December 15, 1987
Filed: May 31, 1988

Before HEANEY, ARNOLD and FAGG, Circuit Judges

HEANEY, Circuit Judge.

I. *Overview*

Burlington Northern Railroad Company (BN) announced its intention to sell a section of its rail lines to the Montana Rail Link (MRL), a newly formed corporation. This type of transaction was recently exempted from Interstate Commerce Commission (ICC) approval requirements, which generally involved the imposition of labor protective conditions. *See Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and*

Operation of Rail Lines under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1986), *review denied sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*Ex Parte No. 392*). After unsuccessfully attempting both to engage BN in negotiations over the effects of the sale on BN employees and later to enjoin the sale, the United Transportation Union (UTU) threatened to strike. BN sought a preliminary injunction against the strike. The district court denied BN's request, finding the Norris-LaGuardia Act, 29 U.S.C. §§ 110-115 (Norris-LaGuardia) prohibited such relief. It did, however, grant an injunction pending review by our Court. On appeal, BN claims that Norris-LaGuardia must be accommodated to the action of the ICC in *Ex Parte No. 392*, and thus cannot bar an injunction. Alternatively, it argues that the Railway Labor Act, 45 U.S.C. § 151-188 (RLA), prohibits the strike because the UTU has not exhausted major dispute procedures under that Act.

We affirm the decision of the district court insofar as it held that Norris-LaGuardia prevents the issuance of an injunction here, and we dissolve the injunction issued by the district court pending this appeal. Second, we find the RLA's major dispute procedures are, in this instance, superseded by the terms of the Interstate Commerce Act, 49 U.S.C. § 10101-11917 (ICA), and thus cannot bar the strike.

II. *Factual Background*

In July, 1987, BN announced its intention to lease approximately 830 miles of its trackage to MRL, a newly formed corporation. These rail lines extend from Huntley, Montana, to Sand Point, Idaho. BN also proposed to sell various branch lines, equipment, personal property,

and facilities to MRL. In the past, this transaction would have been contingent upon the approval of the ICC, and labor protective conditions would normally have been imposed for the protection of BN employees. However, recently, such sales have been exempted from ICC approval procedures. *See Ex Parte No. 392*, 1 I.C.C.2d 810 (1986).

In compliance with *Ex Part No. 392*, MRL filed a petition for exemption. Under the terms of *Ex Parte No. 392*, such exemptions are automatically granted seven days after they are filed. *See* 49 C.F.R. § 1150.32(b). Several parties requested a stay of the exemption. The ICC, however, denied those requests and the exemption issued on July 31, 1987. Finance Docket No. 31087, decided July 31, 1987, *Montana Rail Link, Inc.–Exemption Acquisition and Operation–Certain Lines of the Burlington Northern Rail Company.* Subsequently, a number of the unions representing BN employees, including the UTU, filed petitions to revoke the exemption. These petitions requested labor protection for BN employees affected by BN's action. The ICC has not yet ruled on these petitions. The transaction was closed on October 31, 1987, after the ICC made a specific finding that it was "in the public interest' and after the unions unsuccessfully sought an injunction against the transaction in the United States District Court for the District of Montana. *United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579 (D. Mont. 1987).

Before the Montana district court, the unions sought to enjoin the sale and maintain the status quo until the arbitration and mediation provisions of the RLA were exhausted. The district court refused to grant this request. Relying on *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986,), *cert.*

denied, ___ U.S. ___, 107 S.Ct. 927 (1987), it found that the mandatory bargaining procedures of the RLA would frustrate the action of the ICC and thus did not provide the court with authority to issue an injunction. 672 F. Supp. at 1582. However, the court, citing *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987). did note that there was no inherent incompatibility between the ICC's action and the provisions of Norris-LaGuardia, thus suggesting that Norris-LaGuardia would bar an effort to enjoin a subsequent strike by the unions. 672 F. Supp. at 1582-83 n. 4. The UTU has appealed this decision to the Ninth Circuit.

After the Montana district court denied the unions' motion to enjoin the sale, the UTU threatened a nationwide strike against BN. BN immediately sought a temporary restraining order and a preliminary injunction from Judge Joseph E. Stevens of the United States District Court for the Western District of Missouri. *See Burlington Northern R.R. v. United Transp. Union*, No. 86-5013-CV-SW-8, slip op. (W.D. Mo. Nov. 16, 1987). The court granted the temporary restraining order but subsequently denied the request for a preliminary injunction. In declining to issue a preliminary injunction, Judge Stevens placed primary reliance on *Pittsburgh and Lake Erie*, 831 F.2d 1231. A few hours later, the court granted BN's motion for an injunction pending appeal. We denied UTU's motion to suspend the injunction pending appeal and directed BN to avoid further layoffs until we had decided the matter.

On appeal, BN contends that the ICA vests the ICC with exclusive and plenary jurisdiction to resolve disputed issues. Thus, they argue, Norris-LaGuardia

does not bar an injunction against the proposed strike. Second, BN maintains the RLA prohibits the strike since UTU has not exhausted major dispute procedures.

III. *The ICA, the RLA and Norris-LaGuardia*

A. Statutory Framework

1. The Interstate Commerce Act (ICA)

The ICA is fundamentally a statute designed to regulate commerce. Its goal is to make commerce flow smoothly to the benefit of both American industry and consumers. The Act seeks to ensure fair shipping rates, safety and efficiency in transportation, and to preserve the viability of various modes of transportation. The ICA also seeks to discourage harmful monopolistic practices, detrimental state regulation, and labor strife – all of which tend to impede commerce to the detriment of industry and consumers. *See* 49 U.S.C. §§ 10101, 10101a.

The ICA generally requires that before a railroad acquires an additional line or abandons a line, the rail carriers involved in the transaction must obtain the approval of the ICC. 49 U.S.C. §§ 10901, 10903. Pursuant to the ICA's goal of preventing labor strife by "encourag[ing] fair wages and safe and suitable working conditions in the railroad industry," *see* 49 U.S.C. § 10101a(12), approval by the ICC has in the past generally required the imposition of plans to compensate workers displaced by the particular transaction. These plans are called labor protective conditions or labor protective agreements. Under its authority, the ICC has developed standard labor protective conditions for particular types of transactions.[1]

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[1] When the transaction involves the sale of a rail line, the ICC imposes its *New York Dock* conditions upon the parties. *See New*

In the early 1970's the railroad industry, for a variety of reasons, began to experience economic difficulty. In 1976, concern about the "financial health" of this industry prompted Congress to pass the Railroad Revitalization and Regulatory Reform (4-R) Act, Pub. L. No. 94-210, 90 Stat. 31 (1976). The 4-R Act empowered the ICC, *inter alia*, to exempt individual transactions or classes of transactions from the Act's prior approval requirements (and thus avoid the cost of labor protective conditions). Pub. L. No. 94-210, 90 Stat. at 42.

Four years later, in another deregulatory effect, Congress passed the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). In the Staggers Act, Congress attempted to "reduce regulatory barriers to entry into and exit from the [railroad] industry." *Id.* § 101(a), 94 Stat. 1897, codified at 49 U.S.C. § 10101a. Specifically, the Act broadened the exemption provisions codified at 49 U.S.C. § 10505, to provide that exemptions "shall" be granted to carry out the Staggers Act national rail policy. 94 Stat. at 1913.

In 1986, the ICC, in an ex parte rule-making procedure, exercised its new section 10505 power to exempt, as a class, line sales to "new carriers"[2] from the detailed approval procedures required under section 10901. *See Ex Parte No. 392*, 1 I.C.C.2d 810 (1986). To facilitate these sales, the ICC further prescribed an expedited approval procedure in place of the procedure that would otherwise apply under section 10901(b).

York Dock Ry.–Control–Brooklyn E.D. Terminal, 360 I.C.C. 60 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979). If it is a case of abandonment, it imposes *Oregon Short Line III* conditions. *See Oregon Short Line R.R.–Abandonment*, 360 I.C.C. 91 (1979).

[2] "New carrier" means a newly formed railroad not already subject to the ICA.

Under the class exemption, sales to new carriers are authorized to go forward seven days after the parties file verified notices with the ICC. *Id.* at 820, *see also* 49 C.F.R. § 1150.32(b).

The ICC's action in *Ex Parte No. 392* was appealed to the United States Court of Appeals for the District of Columbia Circuit. That court denied review of the ICC's action without an opinion. *Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

2. The Railway Labor Act (RLA)

The RLA regulates the relationship between railroads and their employees. The purposes of the Act include avoiding interruption to commerce, ensuring worker freedom of association and the right to unionize, providing for the "prompt and orderly" settlement of employment related disputes, and securing the "complete independence" of railroads and their employees in matters of self-organization and in carrying out the Act's other purposes. *See* 45 U.S.C. § 151a.

Under the RLA, controversies over proposed changes in collective bargaining agreements are termed "major" disputes (to be distinguished from "minor" disputes over the "interpretation or application"of existing agreements and practices). *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723-24 (1945). Under §§ 2 Seventh and 6 of the Act, a party desiring to change a working condition embodied in an existing agreement, or to bring a condition not previously covered within an agreement, must serve a "§ 6 notice" upon the opposing party. 45 U.S.C. §§ 152 Seventh, 156. The resulting major dispute is subject to dispute resolution including conferences, mediation, and, in some cases, proceedings before a presidential emergency board. 45 U.S.C.

§§ 155, 156, 160. Until these procedures are exhausted, neither party may change the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 153 (1969).[3]

3. The Norris-LaGuardia Act

The Norris-LaGuardia Act withdraws jurisdiction from the federal courts in cases growing out of labor disputes. The Act clearly states:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as the terms are herein defined) from * * *
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104.

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[3] The Act lacks any mechanism to compel agreement in major disputes. Binding arbitration of a major dispute is available only if both parties agree to it. *See* 45 U.S.C. §§ 155, 157; *Elgin J. & E. Ry.*, 325 U.S. at 725.

Section 3 of the RLA commits minor disputes over the "interpretation or application" of existing agreements and practices to the exclusive jurisdiction of Adjustment Boards, i.e., to "compulsory arbitration." *Brotherhood of R.R. Trainmen v. Chicago R. & I. R. R.*, 353 U.S. 30, 39 (1957); 45 U.S.C. § 153 First (i); *see Elgin J. & E. Ry.*, 325 U.S. at 724. If the resolution of a labor dispute arguably depends upon the interpretation or application of a collective bargaining agreement or established past practice, the dispute must go to an Adjustment Board, not to a court. *Brotherhood of Maintenance of Way Employes v. Burlington Northern Ry.*, 802 F.2d 1016, 1022, (8th Cir. 1986). While the controversy is pending before the Board, the carrier is free to apply its interpretation of the disputed agreement or past practices. *Id.*

The public policy behind Norris-LaGuardia is clearly stated in the Act. Specifically, the Congress found that prevailing socio-political and economic conditions prevented individual workers from obtaining "acceptable terms and conditions of employment." Therefore, Norris-LaGuardia sought to ensure workers the right to organize and conduct union activities "free from the interference, restraint, or coercion" of employers or their agents by means of labor injunctions. *See* 29 U.S.C. § 102.

B. Analysis

As noted above, the ICA is fundamentally a commerce statute directed toward ensuring the free flow of commerce. The RLA is a labor statute that orders the relationship between railroads and their employees. Norris-LaGuardia is a jurisdictional labor statute designed to deal with historical anti-union animus in the federal courts by withdrawing jurisdiction in cases growing out of labor disputes. Each of these congressional enactments are intended to be preeminent in terms of the subject matter they regulate. However, toward the periphery of the authority granted under each law, there exist overlapping powers and responsibilities which must be accommodated and harmonized.

For example, when the imperatives of labor statutes such as the RLA and Norris-LaGuardia conflict, the federal courts have determined that if the provisions of the RLA represent some "overriding, equally clear yet irreconcilable labor policy" which would be frustrated by the literal enforcement of Norris-LaGuardia's anti-injunction provisions, the latter act can be accommodated. *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, (citing *Chicago &*

North Western Ry. v. United Transp. Union, 402 U.S. 570 (1971); *Boys Market, Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235 (1970); *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963); *Brotherhood of R.R. Trainmen v. Chicago & Indiana R.R.*, 353 U.S. 30 (1957); *Brotherhood of Ry. Trainmen v. Howard*, 343 U.S. 768 (1952)).

Yet, the problem of harmonizing labor statutes with statutes in other fields – particularly those which encourage commerce and industrial expansion – presents far more difficult balancing problems. In this age of trade unions with nationwide membership, it is increasingly difficult to remember that without the clear protections erected by the Congress in Norris-LaGuardia, the RLA, and the National Labor Relations Act, 29 U.S.C. §§ 151-187, the right to organize, the right to bargain collectively, and the right to strike in the United States were simply untenable propositions.

The preamble to Norris-LaGuardia recognized this problem in stark terms. The statute withdrew jurisdiction from the federal courts to enjoin labor disputes in the realization that:

> under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment* * * *.

29 U.S.C. § 102 (emphasis added).

Moreover, the Supreme Court has recently recognized the fundamental importance of Norris-LaGuardia in

terms of the viability of the labor movement:

> The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions.
>
> * * *
>
> The congressional debates over the Norris-LaGuardia Act disclose that the Act's sponsors were convinced that the extraordinary step of divesting federal courts of equitable jurisdiction was necessary to remedy an extraordinary problem.
>
> * * *
>
> The Norris-LaGuardia Act responded directly to the * * * pattern of injunctions entered by federal judges. "The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction."

Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees, 481 U.S. ____, 107 S.Ct. 1841, 1846-47 (1987) (citations omitted).

Finally, experience shows that as the protections of labor statutes are diluted, even under the "neutral" terms of deregulatory actions by Congress, the economic power of employees is visibly diminished by both contracting the authority of their representatives to bargain on their behalf and by reducing the ranks of their organized membership.

With this in mind, we turn to the task of exploring the interplay between the ICA, the RLA, and Norris-LaGuardia.

Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important *but limited aim*, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines. But it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the authority of the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements. Were it otherwise, the ICC's authority in this area, and specifically its recent deregulatory actions, would be largely nullified. However, the ICA does not so easily supersede Norris-LaGuardia for, except where Congress has *specifically exempted the ICA from the operation of other laws and required mandatory labor protective conditions*, nowhere in the ICA is there any indication of its direct incompatibility with the anti-injunction statute. Clearly, Norris-LaGuardia says nothing about the methods by which labor protective agreements are made, but rather represents a completely independent *and very clear* decision by Congress to insulate labor disputes from the injunctive powers of the federal courts.

Our decision in *Missouri Pacific Ry. v. United Transp. Union*, 782 F.2d 107 (8th Cir. 1986) (per curiam), *cert. denied*, ____ U.S. ____, 107 S.Ct. 3209 (1987), when read in conjunction with *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7 and *Railway Labor Executives' Ass'n v. Pittsburgh & Lake*

Erie R.R., 831 F.2d 1231 illustrates implicitly the interaction of these three federal statutes.

In *Missouri Pacific*, we held that when a consolidation transaction subject to 49 U.S.C. §§ 11341, 11347, statutory provisions which specifically *exempt carriers from all other law*[5] and *require mandatory employee protective conditions*[6], neither the RLA nor Norris-LaGuardia could operate to restrict the terms of the ICA. In the *Staten Island* case, the Second Circuit found, in a transaction governed by 49 U.S.C. § 10905 (similar to the transaction here in controversy), there was jurisdiction under the RLA in terms of the bargaining relationship between the railroads and the unions. However, the court found that the ICA's action approving the transaction withdrew from the courts the power under the RLA to "formulate a meaningful remedy without impinging on the ICC's order approving the sale

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[5] 49 U.S.C. § 11341(a) provides:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. • • • A carrier, corporation, or person participating in [an] approved or exempted transaction is exempt from all other law, including State and municipal law, as necessary to let that person carry out the transaction. • • •

"[T]his subchapter" refers to Subchapter III of Chapter 113 of the ICA, §§ 11341-51, under which the transaction in *Missouri Pacific* was approved, and not 49 U.S.C. § 10901, Subchapter I of Chapter 109 of the Act, applicable here.

[6] 49 U.S.C. § 11347 provides:

> When a carrier is involved in a transaction for which approval is sought under [the consolidation provisions] of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement • • • protective of the interest of employees who are affected by the transaction • • •.

in question."[7] 792 F.2d at 12, *see also United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579, 1582-83. They thus dismissed the case under Fed. R. Civ. P. 12(b)(6).[8]

Finally, in the *Pittsburgh & Lake Erie* case, the Third Circuit, with a transaction identical to the one before us, faced a request by an employer railroad to accommodate Norris-LaGuardia to the ICA. The court refused to do so, recognizing both the overriding importance of Norris-LaGuardia and finding no irreconcilability between the ICC's authority over the bargaining process and Norris-LaGuardia's prohibition against injunctions. Specifically, the court stated:

> [None of the provisions] relied on by P & LE which makes the ICC's authority "exclusive" with respect to combinations of carriers, contains any language which would suggest Congress intended to override the anti-injunction policy of section 4 of the Norris-LaGuardia Act by the Interstate Commerce Act. * * * Neither the ICC nor P & LE have pointed to any language in the legislative history of any of the labor laws or the Interstate Commerce Act which suggests that the strong national policy embodied in the Norris-LaGuardia Act is to be subordinated to the ICC's authority to approve an acquisition of railroad property.

831 F.2d at 1235-36.

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[7] In *Staten Island*, the viability of Norris-LaGuardia in terms of the ICA was not at issue.

[8] In *Railway Labor Executives' Ass'n* v. *Pittsburgh & Lake Erie R.R.*, No. 87-3797, slip op. (3d Cir. April 8, 1988), the Third Circuit in a carefully crafted opinon by Judge Becker, recently found that the ICC's action in Ex Parte No. 392 did not preempt the RLA.

Thus, the interplay of these three statutes can be summed up as follows. When the ICA provides a specific exemption from all other law and mandates inescapable employee protective conditions under provisions such as 49 U.S.C. §§ 11341(a), 11347, it effectively supersedes both the RLA and Norris-LaGuardia. If there is no exemption and specific protection is not mandated, the authority of the ICA only extends to the bargaining process concerning wages and working conditions. In these circumstances, while the bargaining provisions of the RLA are superseded, Norris-LaGuardia is unaffected and remains to protect the employees' interests.[9]

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[9] In *United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579, the United States District Court for the District of Montana came to exactly this conclusion. This court, like ours, relying on *Staten Island*, found that mandatory bargaining provisions of the RLA were superseded by the terms of the ICA. However, the court, citing *Pittsburgh & Lake Erie*, found that the ICC's action did not affect the viability of Norris-LaGuardia. Specifically, the court stated:

> Both parties have brought to the attention of the court an opinion handed down by the Third Circuit on October 26, 1987, where the court reversed a district court decision enjoining a labor strike. The Third Circuit found that Section 4 of Norris-LaGuardia need not be accommodated to the Interstate Commerce Act. *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R.R. Co.*, 831 F.2d 1231 (3d Cir. 1987).
>
> The case involved facts very similar to those in the instant case. The Railroad was selling its rail lines to a new non-carrier entity which filed for, and received, an exemption pursuant to section 10505 of the ICA. The union filed section 6 notices pursuant to the RLA and the railroad refused to negotiate. However, there the union chose to strike. Section 4 of the Norris-LaGuardia Act forbids federal district court injunctions against labor strikes. 29 U.S.C. § 104.
>
> *A strike by union members against their employer does not directly contradict or encroach upon the authority of the ICC.*

Moreover, this notion of the viability of Norris-LaGuardia in the face of the supersedure of the RLA is clearly in line with what Congress intended. In examining the impetus behind the recent deregulatory efforts in the railroad industry, Congress has sought to free the union-management relationship from time-consuming, "process oriented" bureaucracy imposed by various regulatory statutes and to allow the sagacious invisible hand of the free market economy to reorder rapidly that industry's economic difficulties. Thus, while we agree with BN's contention that enforcing the mandatory bargaining provisions of the RLA might render the changes in the ICA without much practical force, we find, like the Third Circuit, no inherent incompatibility between these actions and Norris-LaGuardia. Clearly implicit in the congressional vision of a vigorous free market is the realization that all major participants in the economy must be left free to exercise their economic strength and thus return the economy to its natural order. We thus find it impossible to believe that Congress would leave the railroads free to exercise their economic power to advance their goals, yet forbid the unions to use their strength to protect the interests of their membership.

In the end, should Congress wish to accommodate Norris-LaGuardia to the ICC in this situation, it can do

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The authorization of the sale still stands, and at the same time the employees have the right to pressure the employer to negotiate labor protections. The case is distinguishable in that an injunction of the sale would itself directly contradict and infringe upon the authority of the ICC. Congress has given full authority over sales and acquisitions of railroads to the ICC pursuant to the ICA.

672 F. Supp. at 1582-82 n. 3 (emphasis added).

so explicitly. Such a decision concerning such a significant change in federal labor policy is too important to be found implicitly by a court in the interstices of a federal statutory scheme.

IV. *Conclusion*

In its decision in *Ex Parte No. 392*, the ICC has acted, within its authority by exempting, as a class, sales to new carriers from the requirement of imposing labor protective conditions. Moreover, the ICC's authority to supervise and implement labor protective conditions in terms of sales, acquisitions, and abandonments by railway carriers insofar as this authority is necessary to "assure fair wages and working conditions" supersedes the authority of the mandatory bargaining provisions of the RLA. We thus dismiss BN's claim under the RLA.[10] However, we find no inherent incompatibility between the recent deregulatory efforts of the Congress and the ICC and the continued viability of Norris-LaGuardia in the circumstances presented here. We thus affirm the decision of the district court declining to issue an injunction against the proposed strike by the UTU and dis-

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[10] We would alternatively dismiss BN's claim under the RLA on the merits. BN maintains that a strike by the UTU should be enjoined because the UTU did not invoke the major dispute resolution procedures of the RLA and thus must exhaust their remedies before they can strike. The UTU did, however, attempt to do so by serving a Section 6 notice, but was frustrated in this effort by an arbitration award holding that, under the applicable collective bargaining agreements, the Union had no right to serve such a notice before April 1, 1988. We believe the operative fact here is that BN itself changed the status quo without serving a Section 6 notice and would thus be barred from seeking injunctive relief by its own omission.

solve the temporary injunction put in place pending this appeal.

FAEG, Circuit Judge, dissenting.

The district court denied BN's motion for a preliminary injunction against UTU's threatened strike, disclaiming jurisdiction to enjoin the strike on account of the Norris-LaGuardia Act (NLGA). *See* 29 U.S.C. § 104. I do not share the district court's view that injunctive relief is unavailable to protect an ICA order from disruption by a union strike that in essence challenges the terms of that order.

The court correctly observes that when the NLGA and the ICA overlap, they "must be accommodated and harmonized." *Ante* at 10. This accommodation is necessary because neither statute "may meaningfully be read in isolation * * * for they are in fact, an integrated plan of railroad regulation. And if, as is frequently the case in such undertakings, there be overlappings, '[w]e must determine * * * how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.'" *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 352 (1960) (quoting *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 806 (1945)) (Whittaker, J., dissenting).

There is no dispute the ICC has discretionary authority to impose labor protective conditions in this type of transaction. *See* 49 U.S.C. § 10901(c)(1)(A)(ii); *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, 1235 (3d Cir. 1987); *Winter v. ICC*, 828 F.2d 1320, 1323 (8th Cir. 1987). It is also clear the ICC has the power to grant or deny UTU's pending request

for those conditions, *ante* at 4, and UTU will have access to judicial review of an adverse decision, *see* 28 U.S.C. § 2321(a). Simply stated, Congress has charged the ICC with the responsibility to impose protective labor conditions that are "necessary in the public interest" in section 10901 transactions. 49 U.S.C. § 10901(c)(1)(A)(ii).

The court holds, however, that when labor protective conditions are discretionary rather than mandatory, the ICA cannot displace the NLGA's antiinjunction provisions because that situation presents no "direct incompatibility" between the NLGA and the ICA. *Ante* at 13. I believe the court and the Third Circuit have drawn an illusory distinction between mandatory and discretionary conditions. *See Railway Labor Executives' Ass'n*, 831 F.2d at 1334-37. This approach to the issue has led the court mistakenly to conclude the district court was correct in deciding it was without jurisdiction to enjoin the UTU strike, and it is at this point that I respectfully part company with the court.

What is really involved in this case is this: whether UTU, displeased with ICC approval of BN's sale of a section of its rail lines to MRL, may bypass the ICC and direct its displeasure at BN for the singular purpose of extracting concessions that are at odds with the terms of the ICC order. I think not, and I believe my view is at the heart of the decision in *Missouri Pacific Railroad v. United Transportation Union*, 782 F.2d 107 (8th Cir. 1986) (per curiam), *cert. denied*, 107 S. Ct. 3209 (1987) (*MoPac*). In adopting the district court's decision permitting the injunction, the court in *MoPac* stated:

> [A]llowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend

> that affected employees have such power to block consolidations which are in the public interest. • • • [I]t is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Id. at 112.

It is apparent a UTU strike here would be aimed at obtaining the essential equivalent of the same labor protective conditions UTU is actively seeking from the ICC. I am persuaded that in these circumstances, just as in cases in which protective conditions are mandatory, the NLGA cannot be used to thwart an ICC order approving the BN-MRL transaction. When viewed from this perspective the potential conflict, while undoubtedly relating to BN' relationship with its employees, does not bear the characteristics of an NLGA section 104 labor dispute. I believe Congress, through the ICA, has granted the ICC authority (subject to judicial review) to resolve conclusively the issues UTU seeks to raise by way of the threatened strike.

In sum, the UTU strike threat amounts to an unacceptable neutralization of congressional policy in favor of the ICC's exercise of expert authority to serve the public interest in the area of railroad service. I believe the provisions of the ICA embody the greater interest when a dispute involving a railroad and its employees has been triggered by an order of the ICC. In these circumstances, the competing aspects of the ICA and the NLGA should have been resolved by the district court in favor of the ICA. Thus, I would reverse the district

court's order disclaiming jurisdiction to consider BN's injunction request.

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Atttest:

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